STATE OF MICHIGAN

COURT OF APPEALS

TRACY NEAL, and All Others Similarly Situated,

Plaintiff-Appellees,

v

DEPARTMENT OF CORRECTIONS, DIRECTOR WILLIAM OVERTON, KENNETH MCGINNIS, SALLY LANGLEY, JOAN YUKINS, CLARICE STOVALL, CAROL HOWES, ROBERT SALIS, CORNELL HOWARD, NANCY ZANG, JOHN ANDREWS, JAN BALDWIN, WES BONNEY, DAVID CRUIKSHANK, JOSEPH DURIGON, WILLIAM ELLISON, CHRISTOPHER GALLAGHER, DAVID HABITZ, EDWARD HOOK, JACK HUTCHINS, DENNIS IFORD, DERLE JONES, ART LANCASTER, THOMAS PORTMAN, ERIN RICHARDSON, RODERICK ROBEY, ANTHONY SIMMONS, MARTIN TATE, CHARLES WILLIAMS, and LYNN WILLIAMS,

Defendant-Appellants,

and

FRED WELCH,

Defendant.

UNPUBLISHED
February 10, 2005

No. 253543
Washtenaw Circuit Court
LC No. 96-006986-CZ

NICOLE ANDERSON, and All Others Similarly Situated,

Plaintiff-Appellees,

v

DEPARTMENT OF CORRECTIONS, DEPARTMENT OF CORRECTIONS DIRECTOR PATRICIA CARUSO, WILLIAM

No. 256506
Court of Claims
LC No. 03-000162-MZ

OVERTON, and KENNETH MCGINNIS,

Defendant-Appellants.

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

In this consolidated case, a class action involving the treatment of female prisoners in the prison system, defendants appeal by leave granted in Docket No. 253543 and Docket No. 256506. In Docket No. 253542, the *Neal* defendants challenge the trial court's rulings denying partial summary disposition on various grounds and denying the motion to decertify the *Neal* class. In Docket No. 256506, the *Anderson* defendants appeal by leave granted and challenge the trial court's decision to certify a class for purposes of that litigation. These appeals have been consolidated and expedited by orders of this Court. We affirm in part, reverse in part, and remand.

I. Substantive Facts and Procedure

In 1996, Tracey Neal, and five other female prisoners[1] filed a complaint on behalf of themselves and all similarly-situated female prisoners against the Michigan Department of Corrections (MDOC), its directors, and various wardens and deputies in the prison system. Plaintiffs filed suit in the circuit court specifically alleging eight causes of action based on the treatment of women prisoners in the prison system.[2] The trial court granted class certification in 1996. Defendants thereafter moved for summary disposition on the claims alleging violations of the Civil Rights Act (CRA), MCL 37.2101 *et seq.* The trial court denied the motion. This Court

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[1] Helen Gibbs, Stacy Barker, Ikemia Russell, Bertha Clark, and Linda Nunn.

[2] Specifically, they alleged: (1) that the failure to prevent and remedy sexual abuse and harassment of female prisoners deprived those prisoners of their rights to privacy and bodily integrity; (2) that the acts described in their complaint constituted unreasonable searches and seizures, deprivations of liberty, and invasions of privacy and bodily integrity; (3) that the acts described in their complaint constituted unnecessary and wanton infliction of pain and suffering and emotional distress and constituted cruel and unusual punishment under the Michigan Constitution; (4) that defendants' failures to prevent and remedy sexual abuse, harassment, retaliation, and violations of privacy violated equal protection; (5) that the employment and assignment of male officers in women's prisons, along with the failure to remedy sexual assaults and harassment, constituted sex discrimination and violated equal protection under the Michigan Constitution; (6) that the failure to prevent or remedy retaliation for reporting misconduct constituted a violation of free speech and association; (7) that the acts referenced in their complaint violated the Michigan Civil Rights Act, MCL 37.2101 *et seq.*; and (8) that the violation of numerous owed duties constituted assault and battery, intentional infliction of emotional distress, and violations of the Michigan Constitution.

granted defendants' application for leave to appeal that decision, and decided both that issue and an issue related to subject-matter jurisdiction. *Neal v MI Dep't of Corrections,* 230 Mich App 202; 583 NW2d 249 (1998) (*Neal I).* Later, this Court granted rehearing and issued a new opinion wherein it held that the protections of the Civil Rights Act extend to prisoners, and that the circuit court had jurisdiction to consider plaintiffs' claims for declaratory and equitable relief. *Neal v MI Dep't of Corrections (On Rehearing),* 232 Mich App 730; 592 NW2d 370 (1998) (*Neal II).*

In *Neal II,* this Court addressed whether Michigan's correctional facilities are places of "public service" in which sex-based discrimination is prohibited under the Civil Rights Act, MCL 37.2101 *et seq.* This Court held that correctional facilities were places of "public service" under MCL 37.2301. *Neal II, supra,* 232 Mich App 735-736. This Court additionally held that the Civil Rights Act, MCL 37.2303(a), was intended to protect prisoners. *Id.* at 738. A special panel was later convened to resolve a conflict between *Neal II, supra,* 232 Mich App 730, and *Doe v Dep't of Corrections,* 236 Mich App 801; 601 NW2d 696 (1999). See *Doe v Dep't of Corrections,* 240 Mich App 199; 611 NW2d 1 (1999). The special panel found the rulings in *Neal II* to be persuasive and consistent with established rules of statutory construction. *Id.* at 201. The Legislature reacted by quickly amending the Civil Rights Act to make clear that its intent was never to include correctional facilities as places of "public service." The Supreme Court later denied defendants' application for leave to appeal *Neal II. Neal v MI Dep't of Corrections,* 467 Mich 857; 649 NW2d 82 (2002).

When the *Neal* case returned to the trial court, plaintiffs filed an amended complaint, alleging the same eight causes of action as articulated in the original complaint. With the exception of Tracy Neal, however, none of the original class representatives remained as named class representatives. Seventeen new women were added as representative plaintiffs. The factual bases for their individual claims were laid out in detail in the amended complaint. In addition, the amended complaint named nineteen new defendants to the case.[3] The amended complaint included allegations at correctional facilities not identified in the original complaint.

Defendants moved for partial summary disposition on several grounds, arguing that the constitutional tort claims against the individual defendants were not viable under *Jones v Powell,* 462 Mich 329; 612 NW2d 423 (2000); that civil rights claims accruing after March 10, 2000, were barred by the amendment to the Civil Rights Act; that claims for injunctive relief were barred by res judicata and collateral estoppel because the same issues were raised by the plaintiffs in *Nunn v MDOC* (ED Mich, LC No. 96-CV-71416-DT) and were resolved in that case; that all but five of the plaintiffs should be removed as class representatives because they were not members of the class when it was formed; that claims of newly added parolees or probationers should be dismissed because those persons were not members of the class; and that the new plaintiffs did not comply with the Prison Litigation Reform Act (PLRA), MCL

[3] William Overton, Clarice Stovall, Nancy Zang, John Andrews, Jan Baldwin, Wes Bonney, David Crukshank, Joseph Durigon, David Habitz, Edward Hook, Jack Hutchins, Dennis ifod, Derle Jones, Art Lancaster, Erin Richardson, Anthony Simmons, Fred Welch, Lynn Williams, and Charles Williams.

600.5501. Defendants also moved to decertify the *Neal* class, arguing in part that the common questions were resolved in *Nunn v MDOC* (ED Mich, LC No. 96-CV-71416-DT). Defendants additionally filed a separate motion for summary disposition, arguing that the Washtenaw Circuit Court did not have subject-matter jurisdiction over the MDOC, McGinnis, or Overton, for certain claims and that those claims needed to be filed in the Court of Claims.

Before the trial court decided any of defendants' motions, it permitted plaintiffs to file a second amended complaint to add allegations that the defendants, who held supervisory positions, aided and abetted civil rights violations, that they assisted or encouraged unlawful conduct and aided and incited others to violate class members' civil rights, and that the nonsupervisory defendants interfered with plaintiffs' right to serve their sentences without discrimination.

The trial court subsequently granted partial summary disposition to defendants under MCR 2.116(C)(4), finding that it did not have subject-matter jurisdiction over any of the claims against the MDOC, McGinnis, or Overton, except the claims brought under the Civil Rights Act. The remainder of the claims had to be filed before the Court of Claims. The trial court denied defendants' motions for partial summary disposition on all other grounds and denied their motion to decertify the *Neal* class. Defendants filed an application for leave to appeal the orders denying their motions in *Neal*, and this Court granted the application in Docket No. 253543.

In response to the order dismissing certain claims for want of subject matter jurisdiction, plaintiffs filed a complaint in the Court of Claims, *Anderson v MI Dep't of Corrections*, LC No. 03-000162-MZ, alleging the same claims that were dismissed from *Neal*. The newly filed case was consolidated with *Neal*. The trial court then certified the plaintiffs as a class in *Anderson*. Defendants filed an application for leave to appeal the grant of class certification in *Anderson*. This Court granted that application in Docket No. 256506, and the appeal was consolidated with the appeal in *Neal*.

II. Summary Disposition

We review the denial of a motion for summary disposition de novo. *Latham v Nat'l Car Rental Systems, Inc*, 239 Mich App 330, 333; 608 NW2d 66 (2000). In addition, issues of law are reviewed de novo. *Cardinal Mooney High School v MI High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991); *Kuebler v Equitable Life Assurance Society of the United States*, 219 Mich App 1, 5; 555 NW2d 496 (1996).

A. Application of *Jones v Powell*[4]

Defendants first argue that the trial court erred when it failed to address their argument that plaintiffs could not maintain constitutional tort claims against the individual defendants in this case pursuant to the application of *Jones, supra.*

[4] *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000).

In 1996, defendants argued that plaintiffs' constitutional claims were barred by governmental immunity. MCL 691.1407. Defendants specifically argued that they were entitled to governmental immunity and that plaintiffs had no right to seek damages for constitutional torts unless they could show that, by custom or policy, defendants deprived plaintiffs of their constitutional rights. The trial court ruled that there is no governmental immunity shield for violations of a plaintiff's constitutional rights and denied summary disposition on that ground as well as in several other respects.[5] In 2003, defendants moved for partial summary disposition and argued, in part, that the only possible target of the constitutional tort claims was the individual employees because money damage tort claims against the MDOC and its directors were already abandoned.[6] Defendants argued that the constitutional tort claims against the individual defendants were not viable based on the rulings in *Jones, supra,* 462 Mich 329. The trial court denied the motion, stating that defendant's motion was merely a "thinly veiled motion for reconsideration that not only fails to meet the requirements of MCR 2.119(F)(1), but also fails on its merits pursuant to MCR 2.119(F)(3)."

Defendants filed an application for leave to appeal the ruling. This Court granted the application. Plaintiffs now argue that the issue should not be decided arguing that defendants seek interlocutory review of the same issue the trial court ruled on in 1996. Specifically plaintiffs argue that because defendants chose not to appeal the issue at that time, and since it could have been raised in the earlier appeal, the facts have remained materially the same, and thus, law of the case and res judicata doctrines preclude reconsideration of the issue.

Plaintiffs' arguments that the issue should not be decided are without merit. First, plaintiffs have provided no authority for their position that a party who files an application for interlocutory leave to appeal must appeal all orders and issues previously decided in the case. Thus, plaintiffs cannot argue that defendants lost the right to appeal this issue because they never raised it in the first appeal. We recognize that generally res judicata requires a party to bring in the initial appeal all issues that were then present and could have and should have been raised. *VanderWall v Midkiff,* 186 Mich App 191, 197-202; 463 NW2d 219 (1990). That holding, however, does not apply where the first appeal is interlocutory and is not an appeal from a final order. *Andrews v Donnelly (After Remand),* 220 Mich App 206, 211; 559 NW2d 68 (1996). Moreover, when a party claims an appeal from a final order, it may raise on appeal all issues related to other orders in the case. *Bonner v Chicago Title Ins Co,* 194 Mich App 462, 472; 487

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[5] Two of those grounds were raised by defendants in their prior interlocutory appeal, specifically defendants appealed the trial court's ruling that the MDOC provides a "public service" under the Civil Rights Act, and that the trial court had subject-matter jurisdiction over the case. This Court granted the application, limited to those issues only. *Neal v MI Dep't of Corrections,* unpublished order of the Court of Appeals, entered October 31, 1996 (Docket No. 198616).

[6] On October 31, 1996, plaintiffs voluntarily stipulated to dismiss plaintiffs' constitutional tort claims for monetary damages against the MDOC and defendant McGinnis in his official capacity. The trial court entered an order dismissing those claims. This Court recognized that plaintiffs were no longer seeking money damages against the MDOC or its director in his official capacity. *Neal II, supra,* 232 Mich App 742-743.

NW2d 807 (1992). Defendants could have raised this issue, assuming it was raised in the trial court, on appeal from the final order in the case. The issue was not waived or rendered moot simply because it was not presented for review in the first interlocutory appeal.

Second, with respect to res judicata, the doctrine does not apply to bar consideration of the issue.

> The doctrine of res judicata bars relitigation of a claim where the same parties fully litigated a claim and a final judgment has resulted. Application of the doctrine of res judicata requires that (1) the first action be decided on the merits, (2) the matter being litigated in the second case was or could have been resolved in the first case, and (3) both actions involved the same parties or their privies. [*Andrews, supra,* 220 Mich App 209 (internal citations omitted.)]

A plaintiff cannot successfully assert res judicata against a defendant if he cannot establish that a final judgment was entered between the two parties. *Id.* There has been no final judgment entered in this case. Res judicata cannot apply. Furthermore, plaintiffs' reliance on *South Macomb Disposal Authority v American Ins Co,* 243 Mich App 647; 625 NW2d 40 (2000) is inappropriate because unlike that case, there was no final judgment on any claims in this case.

Finally, the law of the case doctrine also does not apply to bar consideration of the legal issue with respect to the viability of the constitutional claims against the individual defendants in this case. Where an interlocutory appeal is filed and an issue that may exist is not addressed by this Court, the law of the case doctrine is inapplicable. *Andrews, supra,* 220 Mich 210-211.

Since plaintiffs have not established that any legal doctrines bar consideration of the issue presented we will consider the merits of the issue concerning the application of *Jones, supra*. In *Jones, supra,* 462 Mich 332, the plaintiff pleaded claims against the city of Detroit and several individual police officers. She alleged numerous theories of liability, including that her constitutional rights and federal civil rights were violated. *Id.* The jury awarded the plaintiff monetary damages from one of the individual defendants on her constitutional claims. *Id.* at 332-333. This Court remanded the case for entry of a judgment of no cause of action in favor of that defendant. *Id.* at 333. Our Supreme Court affirmed, ruling that its prior decision in *Jack Smith v Dep't of Public Health,* 428 Mich 540; 410 NW2d 749 (1987), did not allow for a damages remedy for violations of the Michigan Constitution in actions against a municipality *or an individual government employee. Jones, supra,* 462 Mich 335 (emphasis added). See also *Lavey v Mills,* 248 Mich App 244, 250; 639 NW2d 261 (2001); and *Estate of Charles Smith v Michigan,* 256 F Supp 2d 704, 705 (ED Mich, 2003).

Regardless of the constitutional rights allegedly violated, damage remedies against individual government employees for those constitutional violations do not exist. For that reason, the trial court should have dismissed the constitutional claims for money damages against the individual defendants in this case. Plaintiffs' concerns that there may be no other remedies against these individuals does not warrant a different result. *Jones, supra,* 462 Mich 337. Common-law tort claims and other claims could have been, and are being, pursued, i.e., assault and battery allegations and claims under the Civil Rights Act. In sum, the individual defendants were entitled to summary disposition on the constitutional claims for monetary damages brought against them.

B. Application of *Jager v Nationwide Truck Brokers, Inc.*[7]

Defendants argue that the trial court erred in failing to follow *Jager, supra,* when it held that plaintiffs were free to pursue claims against individual state defendants under the Civil Rights Act. Plaintiffs argue that *Jager, supra,* is inapplicable because the issue of individual liability in the context of public services was not addressed by *Jager*, and thus, *Jager* does not require dismissal of the civil rights claims against the individual defendants in this case.

Plaintiffs specifically pleaded their civil rights claims under MCL 37.2103, MCL 37.2301 *et seq.*, and MCL 37.2701 *et seq.* They alleged that defendants' acts and omissions constituted violations of the Civil Rights Act because the acts constituted sexual harassment, included threats to deny privileges or opportunities, and resulted in the denial of privileges and opportunities. Plaintiffs also alleged that defendants, who held supervisory positions, violated the Civil Rights Act by assisting or providing assistance or encouragement, and by aiding, abetting, and inciting other defendants and corrections employees to violate plaintiffs' rights. Further, defendants in nonsupervisory positions interfered with plaintiffs' right to full and equal utilization of public services, and defendants' employers were strictly liable or vicariously liable for the acts of their employees, contrary to MCL 37.2103(h)(i), (ii), and (iii).

In *Jager, supra,* 252 Mich App 467-468, the plaintiff was employed by two of the defendants and was leased to Nationwide Truck Brokers through an employee lease agreement. The plaintiff alleged that her supervisor at Nationwide Truck Brokers made unwanted sexual advances, sexually assaulted her, and made sexually explicit remarks to her. *Id.* at 468. The plaintiff filed a complaint, alleging two claims under the Civil Rights Act. Her claim for sexual harassment fell within the ambit of MCL 37.2202(1), that prohibits an *employer* from discriminating against employees and applicants for employment because of sex and includes sexual harassment. *Id.* at 471.[8] This Court examined whether the individual defendant, accused of harassing the plaintiff, could be liable under the Civil Rights Act. *Id.* at 478. In doing so, this Court examined the definition of "employer" within the Civil Rights Act. MCL 37.2201(a) defines employer as "a person who has 1 or more employees, and includes an agent of that person." This Court held that the use of the word "agent" in the definition of "employer" was meant to denote respondeat superior liability and not individual liability. In other words, the reference to "an agent" in the definition of "employer" "addresses an employer's vicarious liability for sexual harassment committed by its employees." *Id.* at 484, citing *Chambers v Trettco, Inc,* 463 Mich 297, 310; 614 NW2d 910 (2000). The Court noted that a plaintiff may commence an action against the supervisor under traditional tort theories. *Id.*

This Court's holding in *Jager* was broadly stated with respect to individual liability. The facts of the case, however, did not involve any other provisions of the Civil Rights Act, except

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[7] *Jager v Nationwide Truck Brokers, Inc,* 252 Mich App 464; 652 NW2d 503 (2002).

[8] MCL 37.2202(1)(a) states, in relevant part, that an employer shall not fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, because of sex.

MCL 37.2201 *et seq*. The language of the Civil Rights Act provisions under which plaintiffs here have brought their claims is different than the language interpreted in *Jager* and merits separate consideration. The fundamental aim of statutory construction is to give effect to the intent of the Legislature. *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 392; 594 NW2d 81 (1999). This Court must look at the specific statutory language, and if it is "'clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written.'" *Id.*, quoting *USAA Ins Co v Houston General Ins Co*, 220 Mich App 386, 389; 559 NW2d 98 (1996).

MCL 37.2302(a) provides that, except where permitted by law, a *person* shall not

> [d]eny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

A "person" is defined as "an individual, agent, association, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, unincorporated organization, the state or a political subdivision of the state or an agency of the state, or any other legal or commercial entity." MCL 37.2103(g). The plain language of MCL 37.2302, when considered with the applicable statutory definition, prohibits individuals from engaging in the stated conduct. In other words, MCL 37.2302 recognizes that an individual may deny another person the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service. Unlike MCL 37.2202, that prohibits an *employer* from engaging in certain conduct, the language at issue prohibits a large category of "persons" from engaging in the prohibited conduct. Similarly, the plain language of MCL 37.2701 prohibits *individuals* from engaging in certain conduct.

Based on the definition of "person" within the Civil Rights Act, MCL 37.2103(g), an individual person is prohibited from engaging in conduct prohibited by MCL 37.2701. See *Rymal v Baergen*, 262 Mich App 274, 295; 686 NW2d 241 (2004). Therefore, we agree with the trial court that *Jager, supra*, 252 Mich App 464, is inapplicable to this case. Plaintiffs' claims against the individual defendants under MCL 37.2301 and MCL 37.2701 are not barred.

C. Effect of Amendment of MCL 37.2301(b)

Defendants argue that the trial court erred when it concluded that the amendment of MCL 37.2301(b) did not preclude plaintiffs from pursuing claims under the act although their claims accrued after the effective date of the amendment. Effective March 10, 2000, the Legislature amended MCL 37.2301(b) to add the following italicized language:

> "Public service" means a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide a service to the public, *except that public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment.*

The enacting language of 1999 PA 201 provides the following:

> This amendatory act is curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision in *Doe v Department of Corrections*, 236 Mich App 801 (1999). This legislation further expresses the original intent of the legislature that an individual serving a sentence of imprisonment in a state or county correctional facility is not within the purview of this act.

In *Doe, supra,* 236 Mich App 801, 807 this Court, citing *Neal II, supra*, 232 Mich App 730, held that the Handicappers Civil Rights Act, like the Civil Rights Act, applies to prisoners. Later, in *Doe, supra,* 249 Mich App 61, this Court considered the retroactivity of the amendment exempting correctional facilities from the scope of the Handicappers Civil Rights Act. The amendment to that provision, MCL 37.1301(b), is identical to the amendment of the Civil Rights Act, MCL 37.2301(b), and the enacting language for both provisions is also identical. In *Doe, supra*, 249 Mich 61, this Court recognized that "a law may not apply retroactively if it abrogates or impairs vested rights, creates new obligations, or attaches new disabilities regarding transactions or considerations already past." This Court ruled, however, that a "cause of action becomes a vested right when it accrues and all the facts become operative and known." *Id.* at 61-62. In *Doe,* the plaintiffs claimed that they had vested rights in their causes of action when the amendment became effective. *Id.* This Court agreed, finding that the plaintiffs' cause of action had accrued and all facts had become operative and known before the effective date of the amendment.

Plaintiffs argue that the ruling in *Doe, supra*, 249 Mich App 49 is the "law of the case."

> The law of the case doctrine provides that 'if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.' . . . Thus, as a general rule, a ruling on a legal question in the first appeal is binding on all lower tribunals and in subsequent appeals. *The law of the case doctrine applies only to questions actually decided in the prior decision and to those questions necessary to the court's prior determination.* The rule applies without regard to the correctness of the prior determination. [*Kalamazoo v MI Dep't of Corrections (After Remand),* 229 Mich App 132, 135; 580 NW2d 475 (1998) (citations omitted; emphasis added).]

However the *Neal* and *Doe* cases are plainly not the same case. They involve different parties and different statutory acts. Further, no court has addressed the applicability of the amendment of MCL 37.2301(b) to claims accruing after the effective date of that amendment. We reject plaintiffs' argument that, because the issue of the application of the amendment was raised in a "supplemental application for leave to appeal" to the Supreme Court in *Neal II, supra,* 232 Mich App 730, and the Supreme Court denied that application, the issue has been decided. *Neal, supra,* 467 Mich 857. Orders denying leave to appeal are generally considered as acts of judicial discretion and not expressions of opinion on the merits of a case. *Great Lakes Realty Corp v Peters,* 336 Mich 325, 328-329; 57 NW2d 901 (1953). Thus, when it denied leave to appeal, the Supreme Court did not reject the merits of defendants' position.

Based on the rulings in *Doe, supra,* 249 Mich App 63, we conclude that the amendment to MCL 37.2301(b) should not be applied to any claims that had already vested when the amendment became effective. See also *Karl v Bryant Air Conditioning Co,* 416 Mich 558, 573-575; 331 NW2d 456 (1982). The record displays that several members of the class had vested claims pending under MCL 37.2301 at the time the statutory amendment became effective. The amendment during the pendency of the class action has no bearing on those rights because they were fixed by law before the amendment. See *Chesapeake & Ohio R Co v Public Service Comm,* 5 Mich App 492, 506; 147 NW2d 469 (1967).

We must determine, however, whether the amendment to MCL 37.2301(b), effective March 10, 2000, applies to class member claims that accrued after that date. Statutes are presumed to operate prospectively unless the Legislature intended retroactive application. *Lynch v Flex Technologies, Inc,* 463 Mich 578, 583; 624 NW2d 180 (2001). The record shows that many class member claims may have accrued after the amendment, i.e., the wrongs upon which the claims under the Civil Rights Act are based occurred after March 10, 2000. Because statutes are presumed to operate prospectively, *Lynch, supra,* 463 Mich 583, and the relevant date for determining the applicability of the amendment is the date the claims accrued or the facts became known and operative, *Karl, supra,* 416 Mich 573; *Hill v General Motors Acceptance Corp,* 207 Mich App 504, 513-514; 525 NW2d 905 (1994) we conclude the claims of class plaintiffs, that accrued after March 10, 2000, must be dismissed. The class plaintiffs whose claims accrued after the effective date of the amendment had no vested rights for claims under MCL 37.2301. *Id.* They had nothing more than an expectation, based on an anticipated continuance of the present law. *Detroit v Walker,* 445 Mich 682, 699; 520 NW2d 135 (1994).

D. Relation-Back Doctrine

Defendants argue that the trial court erred when it determined that the statute of limitations did not preclude plaintiffs' amended complaint for the reason that the amended complaint related back to the original complaint. It is undisputed that the statutes of limitations for class member claims were tolled upon the filing of the complaint in 1996. MCL 3.501(F). None of the circumstances of MCR 3.501(F)(2) occurred such that the period of limitations resumed running against the class members. The question before us, however, is whether the amendments to the complaint that were made in 2003 relate back to the date of the initial filing.

The class action rules, MCR 3.501, do not provide comprehensive rules for class action litigation, but only provide specialized rules with respect to certain aspects of representative actions. In *Cowles v Bank West,* 263 Mich App 213, 221; 687 NW2d 603 (2004), this Court held that the general rules of civil procedure must necessarily be applied to supplement the specific rules pertaining to representative actions. The Court recognized that there is no particular rule governing the relation back of amendments in class action lawsuits, and applied MCR 2.118(D).

Pursuant to MCR 2.118(D), an amended pleading may introduce new facts, new theories, or even a different cause of action as long as the amendment arises from the same transaction set forth in the original pleading. *Doyle v Hutzel Hosp,* 241 Mich App 206, 212-213; 615 NW2d 759 (2000), citing *LaBar v Cooper,* 376 Mich 401, 406; 137 NW2d 136 (1965). Thus, if plaintiffs' added claims arose from the same factual bases as alleged in the original pleading, the claims relate back to the initial filing. However, the relation-back doctrine does not extend to the addition of new parties. *Cowles, supra,* 263 Mich App 229; *Hurt v Michael's Food Center, Inc,*

220 Mich App 169, 179; 559 NW2d 660 (1996). It is the general rule that "[c]ommencement of an action against one party usually does not operate to toll the running of the applicable period of limitation as to other persons not named as defendants in the suit." *Ray v Taft*, 125 Mich App 314, 318; 336 NW2d 469 (1983), citing *Matti Awdish, Inc v Williams*, 117 Mich App 270, 277-278; 323 NW2d 666 (1982). Further, in *Employers Mutual Casualty Co v Petroleum Equipment, Inc*, 190 Mich App 57, 63; 475 NW2d 418 (1991), this Court ruled that the plaintiff could not rely on the relation-back doctrine when adding a new party defendant. *Id.* at 61-63. The date of the filing of the first amended complaint adding the new defendant was the date used for purposes of computing the timeliness of the claims against that defendant. *Id.*

While plaintiffs in this case were entitled to rely on the filing of the class action to toll their claims, MCR 3.501, and to rely on the relation-back doctrine to add claims arising out of the conduct, transactions, or occurrences set forth in that initial complaint, MCR 2.118(D), they were not permitted to add new parties by way of their amended complaint and rely on the tolling provisions of MCR 3.501 to justify the additions. Because the relation-back doctrine does not apply to the newly added defendants, the claims against them must be dismissed if those claims were time barred when the first amended complaint, naming the new defendants, was filed. January 27, 2003, the date that the amended complaint was filed, is the relevant date for computing whether any claims against the new defendants were timely filed. On remand, the trial court must consider whether any of the claims against the nineteen new defendants were filed within the applicable period of limitations.

E. Prison Litigation Reform Act[9]

In their statement of the questions presented, defendants raise an issue with respect to the trial court's ruling on the applicability of the Prison Litigation Reform Act (PLRA), MCL 600.5501 *et seq*. to prisoners added to this class action after November 1, 1999, the effective date of the act. Defendants argument is cursory and cites no authority to support the assertion that the PLRA was applicable to this case. Left with a dearth of authority and no explanation or rationalization for their claim that the PLRA should be applied to any class members, we deem the issue abandoned. An appellant may not simply announce a position and leave it to this Court to discover and rationalize that position, nor may it give cursory treatment with little or no citation of supporting authority. *Hougton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

III. Class Certification

"[W]e review the trial court's decision on a motion for decertification for clear error, applying the same standard applicable to our review of a trial court's decision on a motion for certification." *Tinman v Blue Cross Blue Shield of Michigan*, ___ Mich App ___; ___ NW2d ___ (2004) citing *Hamilton v AAA Michigan*, 248 Mich App 535, 541; 639 NW2d 837 (2001). "A finding is clearly erroneous when, although there is evidence to support it, this Court is left

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[9] MCL 600.5501 *et seq*.

with a definite and firm conviction that a mistake has been made." *Id*., citing *Neal v James*, 252 Mich App 12, 15; 651 NW2d 181 (2002).

A. *Neal*

Defendants argue that the trial court erred when it failed to decertify the class in *Neal* because there was no longer an overarching common issue that justified certification, and because the case is overshadowed by an unmanageable variety of individual issues. Defendants also argue that, because comprehensive relief has already been put into place to address many of the constitutional issues involved, there are no longer common questions of fact and law that predominate in *Neal* and thus, the class should be decertified.

MCR 3.501(A) sets forth the applicable rules for class certification. It provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
>
> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

MCR 3.501(B)(3)(e) contemplates that a trial court may revoke certification. It provides that, if certification is revoked, the action shall continue by or against the named parties alone.

In this case, plaintiffs moved for class certification in June 1996. In moving for class certification, plaintiffs argued that the requirements for class certification under MCR 3.501 were met. With respect to commonality, plaintiffs argued that there were "numerous" common questions, but failed to articulate any specific common questions. Without making any specific findings, the trial court certified the class in August 1996, and defined the class as follows:

> All women prisoners under the jurisdiction of the Michigan Department of Corrections (MDOC) past, present and future who during their incarceration have been or will be subjected to sexual misconduct, sexual harassment, violation of their privacy rights and/or physical threats or assaults on their persons by male employees of the MDOC or who have been or will be retaliated against for reporting or resisting such actions.

Subsequently, defendants brought a motion to decertify the class. The trial court denied

the motion in January 2004 in a written order. In the order, the trial court was primarily concerned with its observations that defendants never appealed the original class certification order during the prior appeal. The trial court also stated, citing *Coley v Clinton*, 635 F2d 1364, 1378 (CA 8, 1980), that class certification is an especially appropriate vehicle in a civil rights action seeking declaratory relief for prison reform. The trial court did not, however, address the commonality requirement required by the court rule, MCR 3.501(A), except to state that, as long as the members of the class alleged that they were affected by general policies of the defendant and those policies are the focus of the litigation, the requirement of commonality should be resolved in plaintiffs' favor. Before concluding its discussion of the issue, the trial court found that defendants' motion for decertification of the class was "really a disguised motion for reconsideration and fail[ed] both due to its untimeliness pursuant to MCR 2.119(F)(1) as well as on the merits pursuant to 2.119(F)(3)."

This Court recently clarified the standard for reviewing motions for decertification. In *Tinman, supra*, this Court stated that MCR 3.501 requires "that motions for decertification be treated as distinct and independent motions which implicate the same considerations as a motion to certify a class rather than as a motion for reconsideration." *Tinman, supra*, ___ Mich App ___. Applying this rule to the instant case, we conclude that the trial court did not apply the correct standard when it decided the motion for decertification of the class as a motion for reconsideration and therefore clearly erred.

The *Tinman* Court particularly emphasized the fact that because a motion to decertify a class action is akin to a motion for certification of a class action, a motion to decertify a class renews plaintiffs' burden to establish the requirements of MCR 3.501. *Tinman, supra*, ___ Mich App ___. It should be noted, that here, defendants only challenge the commonality factor of MCR 3.501. In any event, our review of the record reveals that there have been extensive changes to the posture of the litigation since 1996, including the dismissal of claims by the trial court for want of subject-matter jurisdiction and other claims as not being viable as a matter of law, specifically the constitutional claims against individual government employees. Further, declaratory and injunctive relief affecting the entire Department of Corrections has been entered as comprehensive settlement agreements effecting the MDOC's policies and practices as a whole were reached in both *Nunn v MI Dep't of Corrections* (ED Mich, LC No. 96-CV-71416-DT) and *United States v MI* (ED Mich LC No. 97-CVB-71514-BDT).

Now, the only remaining claims in *Neal* are the civil rights claims and the common-law tort claims, i.e., assault and battery-type claims. Plaintiffs make the blanket assertion that the policies and procedures of the MDOC overlay all of the claims in the case. Pursuant to *Tinman, supra*, plaintiffs have the renewed burden to articulate how policies and procedures, or lack thereof, overlay the issues that are actually remaining in *Neal* at this time and justify class certification under MCR 3.501(A).

With respect to the general privacy claims and other claims based on policies, procedures, or conditions general to the prison system, it appears that there may originally have been predominating common issues. However, the suit has now evolved to a point where plaintiffs must demonstrate, and the trial court must determine, that the remaining claims involve the MDOC's policies or practices that enabled civil rights violations to occur that are far more predominant, rather than highly individualized determinations. In other words, the trial court must endeavor to discern whether the policies and procedures of the MDOC are the focus of

proof for the Civil Rights Act claims or common-law tort claims. We therefore remand the case to the trial court to allow plaintiffs a full and complete opportunity to fulfill their burden.

B. *Anderson*

Defendants argues that the trial court erred by granting class certification in *Anderson*, where no one set of operative facts establishes liability, no single proximate cause equally applies to each class member, and individual issues outnumber common issues.

The constitutional claims against the MDOC and its directors in their official capacities were dismissed from the *Neal* case and those claims were later filed in the Court of Claims as *Anderson v MI Dep't of Corrections*, LC No. 03-000162-MZ. After the action was filed and consolidated with *Neal*, plaintiffs moved for class certification in *Anderson.* Plaintiffs argued:

> The last motion is our motion for class certification. As the Court knows, Plaintiffs originally filed this case in 1996 raising constitutional violations, damages and requests for injunctive relief against these defendants.
>
> The Court certified this as a class action in 1996. And the issue on jurisdiction on the constitutional claims was addressed at that time. The Court found there was jurisdiction. The Court of Appeals affirmed. Then there was a change in the law such that these particular claims needed to be refiled in the Court of Claims. It's interesting in that the Court has already certified it as a class for the Plaintiffs for these very claims but since it's now moved over to the Court of Claims we ask that it be recertified in essence. If - - at this point the class of plaintiffs which was preserved in terms of the statutes that reaches back to 1993 for these claims of constitutional violations and injunctive relief. . . .
>
> I think that Plaintiffs clearly meet the numerosity requirement in that there are common questions of law and fact that clearly predominate. In fact, Defendant's own motions for summary disposition of this case and in the Circuit case attest to the common questions of law. They have raised issues to dismiss the - - all of the class claims because of the applicability of the prison litigation reform provides. They have moved to dismiss all class members' claims because of issues of immunity and the lack of availability of certain remedies that are clearly common questions of law that they themselves have identified in their motions for summary disposition.
>
> The questions of fact again clearly predominate. We have challenged Defendant's entire policy of allowing male officers to search women prisoners. We have challenged the facilities' lack of provision of privacy for women, the lack of training, the lack of discipline. And one general overarching factual question is whether there was pervasive risk of harm to these women that the defendants knew about a sexual assault that they failed to take steps.
>
> The question of whether maintaining a class would be superior, the alternative is 400 trials, 400 depositions of the wardens, 400 depositions of the director. The discovery alone would be monumental.

The trial court granted the motion, stating simply that plaintiffs' arguments were "well-briefed, well-reasoned, correct and accurate" without making any specific findings with respect to the elements necessary to support class certification on the record. Again, the elements necessary to support the certification of a class include numerosity, commonality, typicality, fair and adequate representatives, and a finding that the maintenance of the action as a class action will be superior to other available methods of adjudication. MCR 3.501(A)(1)(a)-(e). Because the trial court did not engage in the appropriate analysis under the requirements of the court rule regarding class certification, and did not make any specific findings regarding these factors, we conclude that the trial court clearly erred in its application of MCR 3.501(A).

On appeal, defendants challenge the existence of both commonality and typicality in *Anderson* and additionally argue that individual questions predominate over common questions, making the case unmanageable as a class action. Their argument primarily focuses on claims of sexual harassment and retaliatory discharge and the proofs necessary to prove those types of claims. However, the argument does not account for the claims that are pleaded in *Anderson*. The defendants in *Anderson* are not the corrections officers, who allegedly harassed and abused the prisoners or retaliated against them. The defendants are the MDOC and its directors, in their official capacities. In sum, the *Anderson* claims appear to be general claims related to the policies and procedures of failing to prevent or remedy the challenged conduct and the relief requested seems primarily declaratory and injunctive and related to policies and practices. However, without specific, reviewable findings regarding the class certification rules before us, we must remand the cause to the trial court for the appropriate inquiry.

IV. Conclusion

Defendants were entitled to summary disposition on the constitutional claims brought by plaintiffs against the individual defendants by operation of *Jones, supra*. The trial court did not err when it determined that the rulings in *Jager, supra*, 252 Mich App 464, were not controlling or relevant to the Civil Rights Act claims alleged in this case and therefore, defendants were not entitled to summary disposition on the plaintiffs' claims pleaded under the Civil Rights Act against individual defendants. The statutory amendment of MCL 37.2301, which became effective on March 10, 2000, applies to class member claims that accrued after that date and hence, are barred by the amendment to that statute and must be dismissed on remand. Because the relation-back doctrine does not apply to the newly added defendants, on remand, summary disposition is appropriate for the defendants who were added to the action by way of the amended complaint, if the claims against those defendants were time-barred when the amended complaint was filed. Finally, both *Neal* and *Anderson* are remanded in order for the trial court to engage in the appropriate inquiry under MCR 3.501(A) and make specific findings with respect to the elements necessary to support class certification on the record in both cases.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio